

Court of Appeals,

NOVEMBER, 1893.

FRANCIS DESRIVIERES, & al.,
APPELLANTS,

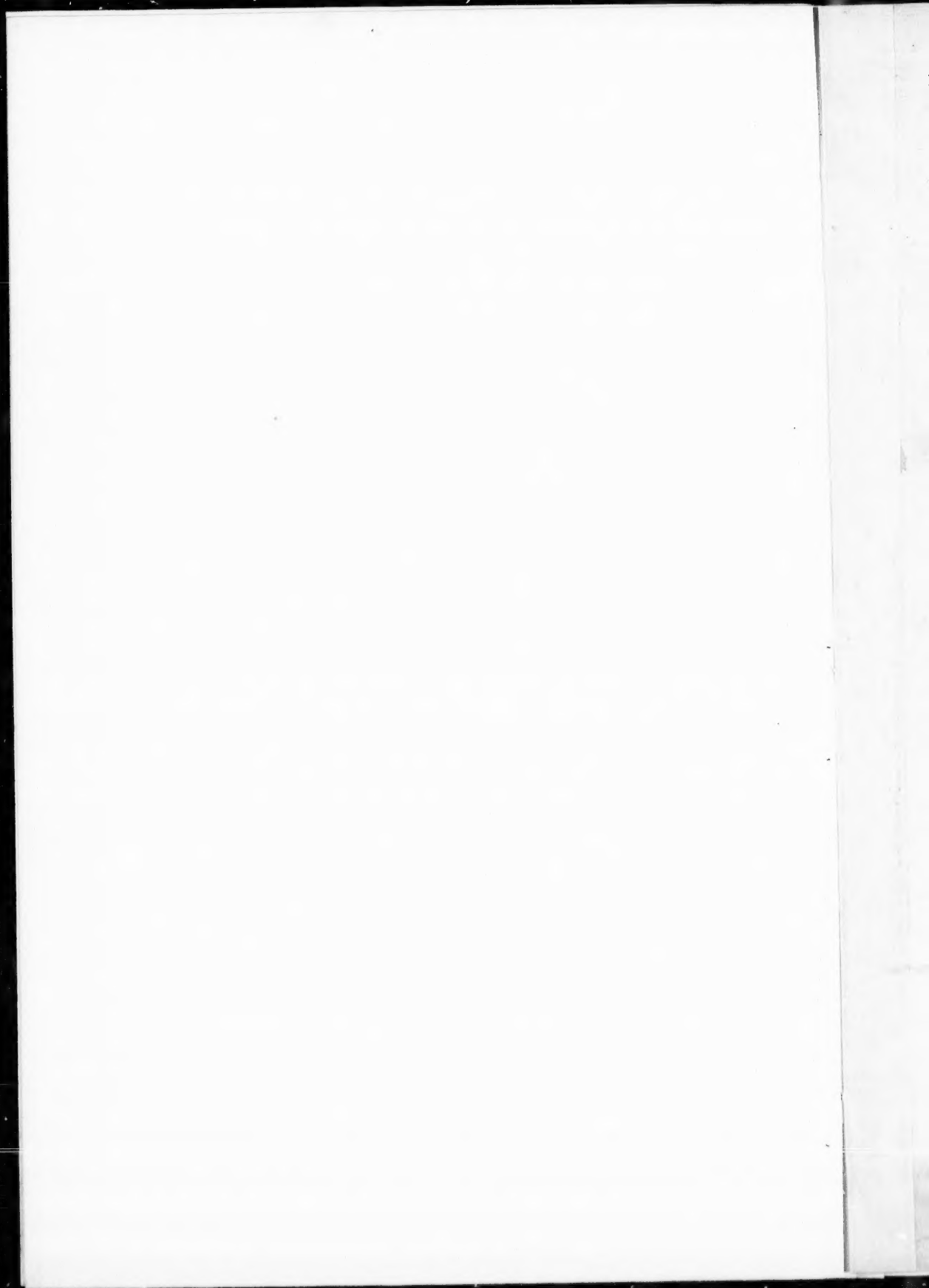
AND

THE HON. JOHN RICHARDSON, & al.
RESPONDENTS,

*Case on behalf of Messrs. Richard-
son, Reid, Strahan, Forsyth, Lind-
say and Macnider.*

C. R. OGDEN, FOR RESPONDENTS.

Withdrawn from C.R. Ogden



PROVINCE OF LOWER-CANADA, } *Court of Appeals, 1825.*
DISTRICT OF MONTREAL,

NOVEMBER TERM.



FRANCIS DESRIVIERES, JAMES MCGILL DESRIVIERES,
The Honble. WILLIAM MCGILLIVRAY, Executor, &c. &c.

(Defendants in the Court below,)

AND AGAIN THE SAID

FRANCIS DESRIVIERES, *Intervening party,*

APPELLANTS;

AND

The Honble. JOHN RICHARDSON, & al.

(Plaintiffs in the Court below,)

RESPONDENTS;

Case on the part of the Respondents,

Messrs. Richardson, Reid, Strahan, Forsyth, Lindsay and McNider.

THIS Appeal has been instituted from a final judgment of the Court of King's Bench at Montreal, rendered under the following circumstances:—The late Mr. McGill, of Montreal, by his will dated the 8th of January, 1811, appointed the appellant, one James McGill Desrivieres, and one Charlotte Porteous, his *Légataires Universels*, residuary legatees, in equal shares, but Charlotte Porteous died on the 4th July, 1812, previous to the death of the testator, by which means her share accrued to the two other universal legatees.

By the same will Mr. McGill appointed the late Isaac Todd, Esquire; the Honorable Mr. Richardson; the appellant, and Mr. McGillivray, or any two of them, his *Exécuteurs Testamentaires* with continuance of seisin after the year and day and until the full execution of his will.

One of the main devises in Mr. McGill's will, is a bequest of the estate called "Burnside" to Messrs. Richardson, Reid, Strahan, and Dunlop, their heirs, executors and curators, in trust to convey and assure the same to the Royal Institution for the advancement of learning, constituted and established or to be constituted and established under the Provincial statute, 41 George III. chap. 17, upon condition that the Royal Institution should, within ten years from the testator's death, erect, or cause to be erected, upon the estate of Burnside, an University, containing a college, under the name of McGill College, or should at least, within the same term erect or cause to be erected thereon, a College, under the name of McGill College, and that in case the Royal Institution should either refuse to accept the legacy or neglect to erect or cause to be erected, such University or College, on the estate of Burnside, within the period of ten years from the decease of the testator, or if the bequest should prove void or inoperative, then the estate of Burnside should be conveyed and assured by Messrs. Richardson, Reid, Strahan, and Dunlop, or the survivor of them, or their heirs, executors or curators, to the appellant, who was in that case to have it to him and his heirs for ever.

In addition to the estate of Burnside, Mr. McGill devised by his will, to the said Messrs. Richardson, Reid, Strahan, and Dunlop, a sum of £10,000 in trust for the Royal Institution, to be paid to that body after the lapse of three years from Mr. McGill's decease, with interest from and after the said period of three years, when and so soon as the Royal Institution should have erected or cause to be erected an University or College upon the estate of Burnside, and to be applied towards defraying the expence incurred in erecting and establishing the said University or College, or in maintaining the same after its erection, provided the University or College should be erected in three years after the testator's decease; failing which, Messrs. Richardson, Reid, Strahan, and Dunlop, or the survivors of them, or their heirs, should immediately after the expiration of the said term of ten years, pay the said sum of £10,000 to the appellant, with all the interest then accrued thereon.

Mr. McGill died on the 19th December, 1813.

Mr. James Dunlop, one of the fiduciary legatees, died on the 28th of August, 1815, leaving three executors—Messrs. John Forsyth, William Lindsay, and Adam Lymburner McNider, appointed by his last will, on the 5th May, 1810.

In the Term of June, 1823, K. B. Montreal, Messrs. Richardson, Reid and Strahan, surviving fiduciary legatees under Mr. McGill's will, and Messrs. Forsyth, Lindsay, and McNider, executors of the will of Mr. Dunlop, the other fiduciary legatee, instituted an action *en délitance de legs* against the appellant as *legataire universel* and testamentary executor of the late Mr. McGill; James McGill Desrivieres, the other *legataire universel* of Mr. McGill and

Mr. McGillivray, also testamentary executor of the said Mr. McGill, to recover the legacy of £10,000 with interest, according to Mr. McGill's will, and costs.

To this action Francis Desrivieres pleaded three pleas:—

1st—The general issue.

2nd—The *Defense en droit*.

3d—Peremptory exceptions, alleging different reasons in law and in fact for avoiding the legacy sued for by the Plaintiffs; and that the same has accrued to him the said Francis Desrivieres, under the will of the late Mr. McGill, he being the same Francis Desrivieres in that will mentioned, and to whom the testator has finally devised the estate of Burnside, and the sum of £10,000 bequeathed to his fiduciary legatees, in trust for the Royal Institution, in case the bequest should be or become null and void or inoperative.

Mr. James McGill Desrivieres, another of the Defendants, also defended to the action, but Mr. McGillivray filed no plea and the cause was proceeded upon according to the usual course, until after the closing of the Enquête and the inscription of the Cause on the Rôle for final hearing upon the merits—when Francis Desrivieres produced a petition in intervention, and moved the Court below on the 16th June 1824, for leave to file that petition, which that Court on the 19th of the same month refused to allow, and rejected the motion with costs.

From the judgment rejecting the intervention, Francis Desrivieres appealed and obtained in the Term of November last a reversal of it; this Honorable Court being of opinion that the appellant had by law a right to intervene, the cause having been remitted to the Court below—issue was joined on the intervention.

It is expressly alledged in the petition in intervention, that the petitioner Francis Desrivieres is the same person named in Mr. McGill's will, and one of the Defendants in the case.

The petition contains a plea of "*Litis pendance*."

It also alleges divers reasons why the legacy sued for by the appellants should be considered null, void, and inoperative, and adjudged to the appellant Francis Desrivieres in execution of Mr. McGill's will.

It further states, that the appellant has in his hands the sum of £10,000, and interest sued for, and is entitled to receive it as his own money, and concludes that the legacy made by Mr. McGill's will to the Plaintiffs in trust for the Royal Institution, be declared null *ab initio*, and to have become *caduc*, null and void, and that the appellant be authorised and empowered to retain the said sum of £10,000 and interest, as *Legataire particulier et substitué* of the said Mr. McGill.

The answer of the Respondents to their petition in intervention, contains:

1. A perpetual exception *peremptoire en droit*, alledging that the Royal Institution for the advancement of learning was in existence at the time of the bequest under consideration was made.

That the said bequest was not null and void *ab initio* or become so since, but on the contrary is good and valid in law.

That Letters Patent were passed on the 31st March, 1821, erecting the College to be built into a Corporation, with Officers, which was a complete fulfilment of the conditions attached to the legacy.

That on the 3d day of August, 1820, the surviving fiduciary legatees of the late Mr. McGill conveyed by act executed before Griffin and Baron, Notaries Public, Burnside to the Royal Institution, but of which, Francis Desrivieres refused to surrender and deliver up the possession.

That in consequence, in the Term of October, 1820, the Royal Institution impleaded the said Francis Desrivieres, in an action, *au petitoire*, to establish the right and title of the Royal Institution to the said tract of land called Burnside, and to obtain the possession thereof from the said Francis Desrivieres; that this demand was resisted by Francis Desrivieres; that afterwards, on the 19th October, 1822, judgment was rendered on the pretensions of the respective parties, and the Royal Institution was declared to be the true and lawful proprietor of Burnside, and the said Francis Desrivieres was adjudged within fifteen days to desist from, quit, and abandon the said tract of land, and deliver up the same to the Royal Institution, as also the rents, issues, and profits by the said Francis Desrivieres during his tortious and wrongful possession.

That notwithstanding, the said Francis Desrivieres hath had due notice of said judgment he hath hitherto, and doth still retain possession, and notwithstanding the said judgment hath on his appeal met with the sanction and confirmation of this Honorable Court, he has thought fit to institute an appeal to His Majesty in his Privy Council, where the case now remains pending and undetermined.

That the present action on behalf of the surviving fiduciary legatees to recover the legacy of £10,000 was instituted in the term of June, 1823, long before the expiration of the ten years from and after the death of the late Mr. McGill, from which time, by reason of the unjustifiable proceedings had and taken by the said Francis Desrivieres and James McGill Desrivieres, to retard the decision of the case, thereby to retain and continue his wrongful possession of Burnside, to the exclusion of the Royal Institution, by which conduct and by reason of the said Francis Desrivieres withholding the said £10,000, the Royal Institution have been absolutely prevented from further advancing.

2—A *défense au fonds en droit* is pleaded by the Respondents to the Intervention of Francis Desrivières, which is followed

3—By a *défense au fonds en fait*, concluding to a dismissal of the Intervention. Issue being joined hereupon, the parties by their respective Counsel, in the Court below made certain admissions and a consent rule was entered into, that the evidence adduced on the issue, perfected on the principal demand, should be held and considered as evidence on the petition in Intervention. (No. 73 of the Record.) On the 14th June, 1825, the parties were heard as well on the principal demand as on the petition in Intervention, and on the 20th following final Judgment, was rendered, awarding to Respondents the sum of £10,000 with interest at the rate of 5 per centum per annum, from 20th December, 1816, until the 31st May, 1823, the date of the *demande judiciaire* and at the rate of 6 per centum per annum, from 31st May, 1823, until perfect payment and costs of suit.

It would appear from the grounds of exception, assigned by Francis Desrivières and James McGill Desrivières, to the action as well as by Francis Desrivières in his petition in intervention and from the arguments urged by their Counsel in the Court below—that they rest their defence and that the said petition in intervention is founded on the following propositions:—

1st.—That the legacy in question is null under the declaration of 1743, inasmuch as the tendency of the bequest is to found a novel establishment and that it consequently falls within the scope of the inhibition contained in that law.

2d.—That at the time of the bequest there was no such Corporation in existence as the Royal Institution, nor hath any such been subsequently constituted and established.

3d.—That the condition attached to this legacy was a condition precedent and has not been fulfilled.

Under the first of the propositions stated above, viz.

That the legacy in question is null under the declaration of 1743, &c.

The Respondents contend that this law is repealed as far as it respects the Royal Institution, by the 41 Geo. III. cap.

2 Proposition.—That the Royal Institution was not in existence at the time the bequest under consideration was made.

It is not essential to the validity of a legacy that the Individual in whose favor it is bequeathed should be known, or *in esse* when the bequest is made, provided he can eventually be discovered; this is a well established principle of Law. *Ferrière's Translation of the Instit. Justin. Lib. II. Tit. 20, § 25 & 27.*

The Royal Institution having the capacity to take a bequest by the 41 Geo. III c. and being *in esse* when the present action was instituted, the Respondents invoke the rule of law above cited.

3 Proposition.—That the condition attached to the legacy has not been fulfilled. Testator, in imposing the condition in question, has most distinctly shewn by the terms in which he has expressed himself, that it was to be a condition subsequent, upon the non-fulfilment of which within the period indicated in his will, the right of property in the estate of Burnside should determine, and not as a condition precedent to be complied with previous to the Respondents entering into possession.

“Le mot de condition sert souvent à exprimer les charges, destinations, &c. Ainsi on dit d'un legs qui charge les légataires d'une servitude, qu'il est fait à condition de cette servitude.—*Rep. de Jurisp. Verbo condition p. 393.*”

A man may annex to an Estate a condition, by the performance or non-performance of which the Estate may commence, or may be enlarged or defeated.—*Comyn's Dig. cond. (A.)*

A condition subsequent is such as defeats an Estate by some subsequent Act.—*Ibid. (C.)*

There are no technical words to distinguish conditions precedent and subsequent, but the same words may indifferently make either, according to the intent of the person who creates it.—*Ibid. (B.)*

It is sufficient if a condition be performed in substance.—*Ibid. (G. 14.)*

So if it be performed as near the intent of the condition as can be.—*Ibid. (L. 1.)*

So the non-performance of the condition shall be excused by the default of him who do the first act.—*Ibid. (L. 7.)*

It is preposterous in the Appellants to urge this objection, as by withholding the Estate of Burnside, he has precluded the Respondent from actually constructing a College upon it.

The Letters Patent of the 31st March, 1821, erecting the College to be built into a Corporation, with officers, &c. is as complete a fulfilment of the condition attached to the legacy as the nature of things permitted.

If no edifice has in point of fact been erected on the Estate of Burnside, it is obviously in consequence of the wrongful detention of that property by Francis Desrivières, one of the Appellants, to whom the maxim of Law “*in omnibus causis pro facto cecipitur id, in quo intelligitur id, in quo per alium mora fit, quo minus fiat,*” may be unansweredly opposed.

10/11/25 C. R. P. Shaw
for Respondents.

Quebec, 12th November, 1825.